Filed 7/21/09 P. v. Thompson CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. PERRIE THOMPSON, Defendant and Appellant.	B203650 (Los Angeles County Super. Ct. No. BA305789)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Kennedy-Powell, Judge. Affirmed.

Dan Mrotek, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, James William Bilderback II and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

_____

Perrie Thompson appeals from the judgment entered following his conviction by jury of first degree murder (Pen. Code, § 187) with firearm use (Pen. Code, § 12022.53, subd. (b)), personal discharge of a firearm (Pen. Code, § 12022.53, subd. (c)), and personal discharge of a firearm causing great bodily injury or death (Pen. Code, § 12022.53, subd. (d)) and committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b).) The court sentenced appellant to prison for 50 years to life. We affirm the judgment.

FACTUAL SUMMARY

Viewed in accordance the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that shortly before midnight on June 19, 2005, Ayboni Del Toro (the decedent) suggested to his friend Roger Villalta that they get food from a taco truck located at Main and Gage. Neither Del Toro nor Villalta was a gang member. Del Toro drove Villalta to the location in Del Toro's open-roof Camaro. Del Toro exited the car and went to order food while Villalta remained in the car.

Villalta testified that appellant approached Villalta and said, " 'Where you from?' " Villalta replied he was from nowhere. The area was well lit, Villalta clearly observed appellant's face, and nothing obstructed Villalta's view of appellant. Appellant said, " 'East Side. East Coast. Fuck Flowers.' " Villalta testified that " 'Fuck Flowers' " meant "Fuck Florence." Appellant had his hand under his shirt, simulating that he had a gun. Villalta said, " 'Okay, I don't care.' "

Del Toro returned to the car with food. Villalta warned that appellant might have a gun. Villalta testified that Del Toro said "like, 'Okay. Whatever.' "

Appellant approached Del Toro near the rear of the Camaro and said, " 'Where you from?' " Villalta was watching, looking back through the left rear window. Del Toro replied, " 'Don't come up to me like that.' " Appellant pulled out a handgun and shot Del Toro, killing him.

Villalta testified he did not see the gun, but saw appellant "holding his right arm out and his fist . . . clenched straight out in front of him." Villalta then heard gun shots. Villalta began exiting the car to help Del Toro. Villalta testified that when he heard the shots and was looking back, Del Toro was "trying to like fight for the gun, like one of those two, trying to push him out of the way so he can run." Villalta also testified that Del Toro tried to fight appellant when he pulled out the gun.

Villalta exited the Camaro to help Del Toro. Appellant pointed the gun at Villalta. Villalta ducked behind the Camaro and appellant fled. Villalta chased appellant, who then turned around and pointed the gun at Villalta again. Villalta turned around, then saw Del Toro shaking on the ground. Villalta returned to Del Toro to help him.

Walter Lopez testified that about 11:45 p.m. on June 19, 2005, he and his brother Edwin went to the taco truck. Appellant spoke to Edwin and then spoke to an African-American male. Appellant later approached Del Toro and asked him where he was from. Lopez did not remember what Del Toro said, but Lopez heard five or six gunshots. Lopez took cover. Lopez saw appellant standing with a gun. Appellant pointed the gun at everyone and fled.

Lopez also testified that Del Toro's friend (Villalta) heard the shots and exited the car. Appellant then pointed the gun at Villalta. Villalta took cover. Lopez also testified that Villalta exited the car and tried to pursue appellant. Appellant pointed the gun "just to . . . back him off[.]" Appellant pulled the trigger about three times, and Lopez heard clicking sounds but no gunshots. Appellant waved the gun and started running.

Villalta identified appellant as the shooter from a photographic lineup, at appellant's preliminary hearing, and at trial. Villalta testified at trial that he was positive of his identification of appellant as the shooter. Lopez tentatively identified appellant as the shooter from a photographic lineup and at appellant's preliminary hearing. Lopez testified the shooter was darker in real life than the photograph depicted him. Lopez positively identified appellant as the shooter at the trial, and testified that appellant looked the same in court as he did on the day of the shooting.

However, Lopez also testified that he could not say that he was still certain of his identification of appellant.

Michael McGowan testified as follows. Appellant was one of McGowan's "little partners" in the neighborhood. McGowan was not in a gang at the time of the trial, but was once in a gang, i.e., the Six Deuce East Coast Crips gang. McGowan knew appellant from close family ties and from the gang. In June 2005, McGowan lived a few blocks from appellant.

About 11:45 p.m. on June 19, 2005, McGowan became aware of a problem at the taco truck. McGowan became aware of the problem because appellant told McGowan that appellant had "got into it with a guy at the taco truck."

McGowan also testified as follows. Appellant left McGowan's house, saying that appellant was going to get something to eat. When appellant left for the taco truck, appellant was carrying a .38-caliber revolver in his back pocket. Thirty to forty minutes later, McGowan heard sirens and a helicopter. Appellant returned and said he had gotten into a tussle with a Hispanic male at the taco truck, and that appellant had shot him. McGowan saw the revolver. Appellant said he thought the victim was a member of the Florencia gang. At the time of his trial testimony, McGowan was in custody for convictions for burglary and a drug-related offense. He did not receive any leniency or gifts for his testimony.

A police gang expert testified that appellant admitted he was a member of the Six Deuce gang. The Six Deuce gang was a subset of the East Coast Crips gang. Appellant's moniker was Baby BK. BK meant Blood Killer.

Del Toro died as a result of a single gunshot wound to his back. A video camera inside the taco truck recorded events outside the truck. Photographs produced from the video were admitted in evidence at the trial. Lopez had not seen the video, but he identified appellant as the shooter from a photograph. Bullet fragments recovered from the scene were consistent with .38-caliber, .357-caliber, or 9-millimeter ammunition. No shell casings were found at the scene, which provided evidence that the gunman used a revolver. Appellant presented no defense evidence.

CONTENTIONS

Appellant claims (1) the trial court erred by denying appellant's motion to release juror information and by denying appellant a hearing on jury misconduct, (2) the trial court erred by giving CALCRIM No. 220, and (3) appellant was denied effective assistance of counsel by his trial counsel's failure to object to prosecutorial jury argument.

DISCUSSION

1. *The Court Properly Denied Appellant's Motion for Disclosure of Juror Identification Information.*

a. *Pertinent Facts.*

On July 31, 2007, the jury convicted appellant as previously indicated. After reading the verdicts, the clerk asked the jury, "Ladies and gentlemen of the jury, is this your verdict, so say you one, so say you all?" The reporter's transcript reflects that the jurors responded in the affirmative. The court asked if either party wished to have the jury polled as to the verdict, and the parties replied no.[1] The court indicated it would continue the case for "probation and sentencing" and to permit the People to determine how they would handle count 2.

A letter dated August 3, 2007, from Juror No. 11, to the court states as follows: "Dear Judge Kennedy-Powell, [¶] I was Juror number 11 on the People vs. Perrie Thompson case and I feel it is important that I share my experience and the sadness and regret I have concerning the trial, jury deliberation and my role in reaching a verdict.

"Without giving you a play-by-play description of my experience in the jury deliberation room, I will just say that by the middle of the first full day of deliberation, I was the only juror who had not come to a guilty verdict on the murder count. This

---

[1] The information also had alleged as count 2 that appellant committed attempted murder with Villalta as the victim. The jury indicated they were unable to reach a verdict as to that count. The court declared a mistrial as to count 2. The foreperson indicated the jury had been split 11 for guilty and 1 for not guilty on that count. The court later dismissed that count pursuant to a People's motion.

seemed surreal to me- so I asked if each juror would take a turn and express his or her degree of certainty and the evidence behind that certainty. Since we were not permitted to take into account or discuss anything that was not admitted as evidence in our deliberations, the lack of evidence was a subject my fellow jurors did not feel we should consider. Neither were we to question the lack of any defense [whatsoever], nor let that mean anything. We had been instructed that one witness's testimony was enough evidence to convict as long as we felt that witness was trustworthy and reliable and that it was our job to work together and try to reach a verdict. [¶]

"That night I didn't sleep. It is my opinion that [a] person charged with the burden of judging and possibly convicting [a] fellow citizen with the most serious of crimes deserves to be provided with as much evidence as possible so that he of [*sic*] she might reach an educated and informed decision. I tried to figure out how and if the evidence presented in the trial could possibly prove to me, beyond a reasonable doubt, that the defendant was in fact the person who committed this horrible crime. I questioned whether I could keep my integrity and still play by the rules. I decided that I would request to be released from the jury. [¶]

"The following day I told the others that I wanted to ask the Judge to replace me with an alternate juror because I could not feel confident in the guilt or innocence of the accused based on the information presented in the trial. We chose a new foreman (I was elected to that position on the 1st day) and that foreman thought that I couldn't/shouldn't request to be excused. Someone suggested we listen to a read back of Roger Vialta's [*sic*] testimony, since I felt his was the most credible source of identification. At the end of the day (literally) I caved in. I stated that I was only about 80% convinced of Perrie Thompson's guilt but in an effort to 'work together' I would loosen my standards. A few jurors actually thanked me for demanding a thorough deliberation process. I felt, ultimately, that I gave up my integrity.

"This is why I'm writing to you. I am not a religious person, but I keep praying that this boy committed this crime. I am having panic attacks for the first time in 12 years. I know this would have been a completely different trial if the defendant

weren't poor- look at what is going on at the other end of the hall with Phil Spector who's [*sic*] case should be rather simple considering there were only 2 people present at the time that one of them was shot. [¶]

"In my opinion, Perrie Thompson did not have the effective assistance of council [*sic*] guaranteed to all of us, by the Constitution. I realize that the system is overwhelmed and that public defenders are overworked, but someone has to take a stand for the sake of our justice system and say, 'This just isn't good enough'. That someone should have been me. Instead, I questioned my gut and followed the lead of the majority, sending a young man who was a juvenile at the time he may have committed this crime to prison and labeling him a felon and a murderer for the rest of his life. Maybe I took a vicious gangster off the street who would have killed again. The problem is, I really don't know and I don't know how I will reconcile this. [¶]

"From the moment I uttered the word 'guilty' in the jury room, I wanted to recant my vote- I was weak and didn't stand up under the pressure. I was afraid to face the frustration and disgust I was beginning to feel from some in the jury, I was afraid to face the frustration of the victim's family, the prosecutor and the judge as a lone dissenter, I didn't want to be the one who prevented closure. Upon reflection, I realize that if the other 11 jurors voted not guilty, I would have joined them in that decision, and without regret. I did the wrong thing and I want to know what I can do to fix it. [¶] Sincerely, [¶] Juror 11[.] [¶]

"I am enclosing my name and contact information on a separate page. I hope you do contact me, but if you are required to include this in a file on the case, I want to protect my identity and safety of my family."

In September 2007, appellant filed a written motion to disclose juror information. The motion requested information as to Juror No. 11, so appellant could interview said juror. In October 2007, the People filed an opposition on the grounds appellant had not made the requisite good cause showing, and Juror No. 11, did not wish to speak with either party.

On October 3, 2007, the court called the case. The minute order for that date reflects the case was called for "probation and sentenc[ing.]" The court indicated it

previously had provided the parties with a copy of Juror No. 11's letter except for the separate page thereof which revealed the juror's personal information. During argument on the motion, appellant's counsel commented, "it is possible we don't know all the facts. It is possible that there was misconduct." Appellant's counsel argued that if Juror No. 11, had voted guilty with an abiding conviction, appellant's motion would not have been meritorious, but appellant's counsel did not believe Juror No. 11, ever had entertained an abiding conviction.

Appellant's counsel then stated, "And whether it was misconduct or not, the fact that you have one out of 12 jurors with no abiding conviction of the guilt of the accused beyond a reasonable doubt would be cause for alarm and would be the basis, if true, based on some facts that I would learn from [Juror No. 11], if any, would be the basis for a request for mistrial."

The court later stated, "I've given a lot of thought to this, and the bottom line is, number one, is that although the jurors were not individually polled as to if this was their verdict, the clerk did inquire after the verdicts were read in open court with all the jurors present 'Is this your verdict, ladies and gentlemen, so say you one, so say you all.'

"And I always look at the jurors, and I did in that instance as well, and all of the jurors acknowledged that that was their verdict. [¶] Additionally, as one reads the contents of the letter, there is no indication that there was misconduct somehow that occurred. All that she talks about is that she felt pressure, that she claimed she loosened her standards, but it's all about the thought process of the jury and not that there was any improper influence or threats or evidence that was considered that was not part of the record or anything of that nature.

"And I honestly feel that the People have characterized this correctly in their papers, is that [*sic*] she has a case of buyer's remorse. She made a decision and now, you know, she's second guessing herself after the fact. [¶] And in the absence of some indication that there was some sort of misconduct, we don't look into the thought processes of the jury during deliberations. In fact, that's an area that we're not supposed to look into or inquire about because that -- you know, the jury's deliberations

are -- it's kind of almost sacrosanct aside from some issue or showing of misconduct. [¶] And I don't think that that showing has been made here, so I'm going to deny the request for the motion to disclose juror information at this time."

Appellant indicated he wanted to make clear that "if [he was] able to question the juror, we would simply be able to ask whether there was misconduct." The court indicated appellant's point was clear. Appellant later requested another "sentencing date," and the court continued the matter to November 1, 2007. On that date, the court called the matter for "probation and sentencing." The court sentenced appellant and, upon the People's motion, dismissed count 2.

b. *Analysis.*

Appellant claims the trial court erred by denying his motion for the release of juror information. We disagree.

(1) *Applicable Law.*

Code of Civil Procedure sections 206, subdivision (g), and 237, subdivisions (b), (c), and (d), set forth procedures governing criminal defendants' petitions for access to the court's record of personal juror identification information.[2] Code of Civil Procedure

---

[2] Code of Civil Procedure section 206, subdivision (g), provides, "[p]ursuant to Section 237, a defendant or defendant's counsel may, following the recording of a jury's verdict in a criminal proceeding, petition the court for access to personal juror identifying information within the court's records necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose. This information consists of jurors' names, addresses, and telephone numbers. The court shall consider all requests for personal juror identifying information pursuant to Section 237." Section 237, subdivisions (b), (c), and (d), read, in relevant part, "(b) Any person may petition the court for access to these records. The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information. The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure. A compelling interest includes, but is not limited to, protecting jurors from threats or danger of physical harm. If the court does not set the matter for hearing, the court shall by minute order set forth the reasons and make express findings either of a

section 237, subdivision (b), states that "[t]he court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information, . . ."

Moreover, a defendant makes the requisite good cause showing if a defendant makes a "good cause showing of jury misconduct." (See *People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1322.) Concerning proof of jury misconduct, we note that Evidence Code section 1150, subdivision (a) states: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

Further, when deciding whether to deny a defendant's petition for access to the court's record of personal juror identification information, a trial court can properly consider the extent to which the evidence proffered in support of the petition would be excludable under Evidence Code section 1150, subdivision (a). (*People v. Jefflo, supra,* 63 Cal.App.4th at p. 1322; see *People v. Jones* (1998) 17 Cal.4th 279, 316-317.) Finally, we review a trial court's denial of a petition for access to personal juror identification information under an abuse of discretion standard. (*People v. Jones, supra,* 17 Cal.4th at p. 317.) We will discuss additional law where pertinent below.

---

lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure. [¶] (c) If a hearing is set pursuant to subdivision (b), the petitioner shall provide notice of the petition and the time and place of the hearing . . . . Any affected former juror may appear . . . to protest the granting of the petition. . . . [¶] (d) After the hearing, the records shall be made available as requested in the petition, unless a former juror's protest to the granting of the petition is sustained. The court shall sustain the protest of the former juror if, in the discretion of the court, the petitioner fails to show good cause, the record establishes the presence of a compelling interest against disclosure as defined in subdivision (b), or the juror is unwilling to be contacted by the petitioner."

(2) *Application of the Law to the Facts.*

Appellant argues the trial court erred by denying his motion for release of juror information. In particular, he argues (1) CALCRIM No. 220,[3] reasonably understood, directs jurors to consider lack of evidence when determining whether there is a reasonable doubt, (2) the jurors committed misconduct by disregarding CALCRIM No. 220's directive, as evidenced by Juror No. 11's statement in his letter, "Since we were not permitted to take into account or discuss anything that was not admitted as evidence in our deliberations, *the lack of evidence was a subject my fellow jurors did not feel we should consider*" (italics added); therefore, (3) the trial court erred by denying appellant's motion and "conclud[ing] that no further inquiry based on the letter could possibly show misconduct . . . ."[4]

"Reasonable doubt may *arise* from the *lack* of evidence at trial as well as from the *evidence* presented. [Citation.] The plain language of CALCRIM No. 220 does not

---

[3] Appellant does not, for purposes of this argument, assert that the giving of CALCRIM No. 220, was error. CALCRIM No. 220, states, "The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

[4] This is one of appellant's two main arguments. The other is that the trial court's denial of appellant's motion was error because there was no merit to the People's argument below that Juror No. 11, had refused to be contacted by appellant. There is no need to address whether this second argument is meritorious.

instruct otherwise. The only reasonable understanding of the language, '[u]nless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty,' is that a lack of evidence could lead to reasonable doubt. Contrary to defendants' claim, CALCRIM No. 220 did not tell the jury that reasonable doubt must *arise* from the *evidence*. The jury was likely 'to understand by this instruction the almost self-evident principle that the determination of defendant's culpability beyond a reasonable doubt . . . must be based on a *review* of the *evidence* presented.' [Citations.]" (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1238 (*Campos*), italics added.)

"In [*People v. Westbrooks* (2007) 151 Cal.App.4th 1500 (*Westbrooks*)], the court rejected the contention that CALCRIM No. 220 prohibited the jury from considering the lack of physical evidence implicating the defendant in the crime in determining his guilt. The court held the sentence in question 'merely instructs the jury that it must consider only the evidence presented at trial in determining whether the People have met their burden of proof. In other words, this instruction informs the jury that the People may not meet their burden of proof based on evidence *other* than that offered at trial.' [Citation.]" (*People v. Garelick* (2008) 161 Cal.App.4th 1107, 1118 (*Garelick*), italics added.)

It is clear that CALCRIM No. 220, permits jurors to consider lack of evidence when determining whether there is a reasonable doubt. Moreover, Juror No. 11, stated, "the lack of evidence was a subject my fellow jurors did not *feel* we should consider," and Juror No. 11, effectively provided as the *reason* for that statement that "we were not permitted to take into account or discuss anything that was not admitted as evidence." (Italics added.) Juror No. 11's statement presented inadmissible evidence concerning the mental processes by which the verdict was determined and, to that extent, appellant presented inadmissible evidence to support his claim of jury misconduct. Appellant argues that "[t]he only way juror no. 11 could have understood how [Juror No. 11's] 'fellow jurors' 'felt' on that issue, is by means of their statements." However, nothing precluded the possibility that no such statements were made and that Juror No.

11's statement simply reflected Juror No. 11's own misperception of what transpired during deliberations.

Even if the statement of the jurors' mental processes was admissible, it is not clear from Juror No. 11's statement *why*, according to Juror No. 11, jurors felt they could not consider a lack of evidence. Juror No. 11's statement arguably suggests the jurors erroneously concluded that a reasonable doubt could not arise from a lack of evidence but only from the evidence. If so, in light of the authorities previously cited, this might have been jury misconduct.

However, Juror No. 11's statement alternatively suggests that jurors felt they could not consider a lack of *outside* evidence, i.e., extrinsic or outside evidence brought into the jury room (see *People v. Wilson* (2008) 44 Cal.4th 758, 829). We note Juror No. 11, indicated the reason the jurors felt they could not consider the lack of evidence was "we were not permitted to take into account or discuss *anything* that was *not admitted* as evidence." (Italics added.) If jurors felt they could not consider a lack of outside evidence, this was not jury misconduct.

There is a third possibility as to what Juror No. 11, meant when writing that the jurors felt they could not consider a lack of evidence. Juror No. 11, later expressed concern that the jury had not been presented with "as much evidence as possible." When Juror No. 11, wrote that jurors felt they could not consider a lack of evidence, Juror No. 11, may have meant that they felt they could not consider a perceived failure by the People to present "as much evidence as possible." If the jurors felt this, this was not misconduct. The court, using CALCRIM No. 300, had instructed the jury that "Neither side is required to call all witnesses who may have information about the case or to produce all physical evidence that might be relevant," and there is no dispute that the giving of that instruction was proper. In short, appellant's showing of jury misconduct, even if that showing were admissible, is ambiguous at best.

The issue in this case is not merely whether appellant was entitled to the release of personal juror identification information, but whether, as a threshold issue, appellant's petition made a prima facie showing of good cause for the release of that information, with the result that he was entitled to the hearing referred to in Code of Civil Procedure section 237, subdivisions (b), (c), and (d).

Appellant's alleged prima facie showing consisted of a presentation of inadmissible and ambiguous evidence of jurors' mental processes. We note Code of Civil Procedure section 237, subdivision (b), provides, "The petition shall be supported by a declaration[.]" Appellant's motion contained no such declaration. Appellant's argument below was essentially only that it was "possible" that there was jury misconduct. He also argued that "whether it was misconduct or not," the fact that Juror No. 11, did not have an abiding conviction warranted the granting of appellant's motion so he could investigate the matter and request a mistrial. He further indicated he wanted to "ask" whether there was misconduct, suggesting that, at the time of appellant's motion, there was no evidence of jury misconduct.

The trial court did not, as suggested by appellant, "conclud[e] that no *further* inquiry based on the letter could possibly show misconduct." (Italics added.) Instead, the trial court correctly concluded that appellant's *current* showing was based on inadmissible evidence and did not constitute the requisite (prima facie) showing of jury misconduct. The result was that appellant was not entitled to, and the court did not conduct, the statutorily-required hearing[5] on his motion to disclose juror information. The trial court did not abuse its discretion or commit constitutional error by denying appellant's motion to disclose jury information.

---

[5] Appellant asserts "a hearing on the defense motion was ordered held." On October 3, 2007, the court called the case, but for probation and sentencing. After calling the case, but before sentencing, the court heard argument but, in effect, only on the issue of whether appellant had made a prima facie showing entitling him to the hearing called for by Code of Civil Procedure section 237, subdivisions (b), (c), and (d). The trial court effectively concluded appellant was not entitled to *that* hearing. Appellant later requested another sentencing date, and the matter was continued for sentencing.

2. *The Court Did Not Constitutionally Err by Giving CALCRIM No. 220.*

As mentioned, the trial court gave CALCRIM No. 220 to the jury (see fn. 3, *ante*). Appellant claims, in essence, that the trial court committed federal constitutional error under the Sixth and Fourteenth Amendments, and state constitutional error, by giving the instruction. We conclude otherwise.

Appellant observes the sentence in CALCRIM No. 220, which said, "In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial." Appellant argues that "the jurors understood [CALCRIM No.] 220 to preclude their consideration of a lack of evidence received at trial, in adjudicating guilt. The basis of this understanding was probably undue focus on [the above quoted] one sentence in [CALCRIM No.] 220[.]" Appellant cites the following statement in Juror No. 11's letter as evidence that the jurors understood that they could not consider a lack of evidence in assessing reasonable doubt: "Since we were not permitted to take into account or discuss anything that was not admitted as evidence in our deliberations, the lack of evidence was a subject my fellow jurors did not feel we should consider."

Phrased differently, appellant does not argue that CALCRIM No. 220, by itself, is an erroneous instruction. He argues that Juror No. 11's letter, including Juror No. 11's statement that "the lack of evidence was a subject my fellow jurors did not feel we should consider," demonstrates a reasonable likelihood that the jury in the present case applied the instruction in a way that violated the federal Constitution.

"It is of course true that a defendant need not object to preserve a challenge to an instruction that *incorrectly* states the law and affects his or her substantial rights. ([Pen. Code,] § 1259; *People v. Hillhouse* [(2002)] 27 Cal.4th [469,] 505-506; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.) On the other hand, " ' "Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate *clarifying* or *amplifying* language." [Citation.]' [Citations.]" (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1156, italics added.) Appellant did not request clarifying or

amplifying language as to CALCRIM No. 220 (an instruction which, as discussed below, multiple cases have concluded is a correct statement of the law); therefore, he may not raise here his claim of instructional error.

Even if the issue of instructional error was preserved for appellate review, it does not follow that the giving of the instruction was error. Any arguments that CALCRIM No. 220, itself is erroneous have been squarely rejected. (*Garelick, supra*, 161 Cal.App.4th 1107, 1117-1119; *Campos, supra*, 156 Cal.App.4th 1228, 1237-1238.) Appellant, citing *Garelick*, *Campos*, *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087-1090, *People v. Guerrero* (2007) 155 Cal.App.4th 1264, 1268-1269, *People v. Flores* (2007) 153 Cal.App.4th 1088, 1093, and *Westbrooks, supra*, 151 Cal.App.4th 1500, 1510, concedes "multiple decisions of this Court squarely hold that no reasonable juror could understand the language of [CALCRIM No.] 220 as prohibiting the consideration of a lack of evidence."

Appellant argues a different result should occur in this case because (1) whether federal constitutional error exists does not depend upon whether courts have held an instruction correct under state law, (2) this court is not bound by decisions of other state appellate courts, and (3) the record in those other appellate cases does not include a letter from a juror such as the letter from Juror No. 11.

However, *Garelick* and *Campos*, for example, resolved constitutional challenges to CALCRIM No. 220. (*Garelick, supra*, 161 Cal.App.4th at pp. 1117-1118; *Campos, supra*, 156 Cal.App.4th at p. 1237.) We find persuasive the appellate authorities rejecting appellant's constitutional challenge. The statement in Juror No. 11's letter that "[s]ince we were not permitted to take into account or discuss anything that was not admitted as evidence in our deliberations, the lack of evidence was a subject my fellow jurors did not feel we should consider," as well as the letter generally, consisted of inadmissible evidence of the jury's mental processes by which the verdict was determined (Evid. Code, § 1150, subd. (a)). In other words, appellant is erroneously attempting to use inadmissible evidence to support a claim of instructional error. The trial court did not commit constitutional error by giving CALCRIM No. 220, to the jury.

3. *Appellant Was Not Denied Effective Assistance of Counsel.*

a. *Pertinent Facts.*

The court, using CALCRIM No. 521, instructed the jury on premeditation and deliberation required for first degree murder. During later opening argument to the jury, the prosecutor commented on the element of intent to kill. The prosecutor then, without objection, commented concerning deliberation and/or premeditation as follows: "Now, if the act is done . . . deliberate[ly], which means thought and weighed the pros and cons, and if it is premeditated, which means considered beforehand, then we've reached murder in the first degree. [¶] . . . [¶] Now, deliberation and premeditation. Everyday decisions that we do in our life we deliberate and we premeditate. For example, a stop sign. When we come to a stop sign, we look both to the right and we look to the left and we decide whether it is safe to go forward and enter that intersection. [¶] That split-second decision involves deliberation. Okay. And when you decide that it's safe to enter, that involves premeditation. [¶] So, for example, if you're driving on the freeway and you go 'Okay. I want to go and get into the next lane.' You put your blinker on, you look over, you go into the next lane. You have premeditated and you have deliberated."

b. *Analysis.*

Appellant claims he was denied effective assistance of counsel by his trial counsel's failure to object to the prosecutor's misconduct in misadvising the jury that premeditation and deliberation could occur in a split-second. We disagree.

We resolve the issue relying upon familiar principles.[6] Moreover, in *People v. Williams* (1997) 16 Cal.4th 153 (*Williams*), our Supreme Court stated, "defendant erroneously contends the prosecutor misdefined for the jury the element of deliberation required for a finding of first degree murder, so as to allow a finding of 'deliberation' based on evidence the murder was merely intentional. The record does not support defendant's contention. 'All we want to know,' the prosecutor argued, 'is was the killing accompanied by a clear deliberate intent on the part of the defendant to kill which was the result of deliberation, a result of having formed it in his mind, having been reflected upon even for a *split second* . . . .' Such phraseology does not reduce deliberation to intent, but, rather, expressly retains both concepts, as required for a finding of deliberate, premeditated murder. In fact, the prosecutor's language would seem to pass muster even

---

[6] " 'A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components.' [Citations.] 'First, the defendant must show that counsel's performance was deficient.' [Citations.] Specifically, he must establish that 'counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 216.) "In addition to showing that counsel's performance was deficient, a criminal defendant must also establish prejudice before he can obtain relief on an ineffective-assistance claim." (*Id*. at p. 217.) Moreover, on appeal, if the record sheds no light on why counsel acted or failed to act in the manner challenged, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, an ineffective assistance contention must be rejected. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.)

In *People v. Hill* (1998) 17 Cal.4th 800, our Supreme Court stated, " 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citation.]' [Citation.]" (*Id.* at p. 819.) "Finally, 'when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citation.]" (*People v. Prieto* (2003) 30 Cal.4th 226, 260.)

under what defendant, quoting *Davis v. State* (1972) 251 Ark. 771 [475 S.W.2d 155, 156], asserts is the 'proper definition of deliberation,' i.e., 'weighing in the mind of the consequences of a course of conduct . . . .' There was no misconduct, hence no ineffective assistance." (*Williams, supra,* 16 Cal.4th at pp. 223-224, italics added.)

The record sheds no light on why counsel failed to object to the prosecutor's comments, counsel was not asked for an explanation, and we cannot say that there simply could have been no satisfactory explanation. Indeed, in light of *Williams* and the trial court's instructions on premeditation and deliberation, we conclude appellant's counsel could have failed to object because he reasonably believed there was no reasonable likelihood the jury construed or applied any of the complained-of remarks in an objectionable fashion, and the prosecutor did not commit misconduct.

Moreover, appellant's "split-second" reference, in context, appears to have been associated with deliberation, not premeditation. Further, there was ample evidence that appellant's premeditation and deliberation occurred over a period of time greater than a split second; therefore, it is not reasonably probable that, but for counsel's alleged error, the result of the trial would have been different. We reject appellant's ineffective assistance of counsel claim. (Cf. *People v. Slaughter*, *supra,* 27 Cal.4th 1187, 1219-1220.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.